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New South Wales
Council for
Civil Liberties

Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
Canberra ACT 2600
Australia

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Dear Sir/Madam,

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**RE: Inquiry into the Exposure Draft of the Anti-Money
Laundering and Counter-Terrorism Financing Bill 2005**

The NSW Council for Civil Liberties ('CCL') thanks the Committee for the opportunity to make this submission.

CCL is concerned about the proposed AML/CTF legislation as it introduces an expansive regime for the widespread breach of individual rights, especially the right to privacy, without adequate justification or procedural safeguards. It also represents a denial of government administrative accountability. In doing so, this legislation potentially violates Australia's obligations under international law. This submission will outline the relevant principles and international law, followed by a more detailed examination of how specific provisions raise the above concerns.

International obligations

1. The CCL notes that the Financial Action Task Force ('FATF') *recommendations* are provided by an international body under the Convention against Financing of Terrorism. They are not treaty obligations. As such, the FATF recommendations cannot override Australia's actual treaty obligations. The most important of these are the ICCPR, which is incorporated by the *Privacy Act 1988*. Other treaties include the Universal Declaration of Human Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination, which is incorporated into domestic law by the *Racial Discrimination Act 1975*.
2. The *Privacy Act* and the ICCPR set out the fundamental principle that all human beings are entitled to the basic liberty of privacy and anonymity. The principle is stated in Article 17 of the ICCPR,

'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

'Everyone has the right to the protection of the law against such interference or attacks.'

3. The National Privacy Principles (NPP) give effect to Article 17 by establishing principles of data quality, access and correction, and limitation and security.
 4. While Australia entered a reservation under Article 17 ICCPR for "national security", CCL believes that this reservation should be interpreted strictly. It does not authorise blanket invasion of the rights of individuals, families, and whole communities.
 5. CCL also highlights the fact that standards set out in the ICCPR are only minimum standards. The Human Rights Committee has stated that the ICCPR minimum standards does not lower the standards set out in other international human rights treaties. In addition to obligations under the ICCPR and its optional Protocols, Australia has other binding treaty obligations. These include the obligation to eliminate 'all forms of racial discrimination' under CERD, as incorporated by the *Racial Discrimination Act*.
 6. The *Racial Discrimination Act* provides,

'It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.' (section 9(1))
 7. The *Racial Discrimination Act* also provides,

'a person requires another person to comply with a term, condition or requirement which is not reasonable ... [and this] ... has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, by persons of the same race, colour, descent or national or ethnic origin as the other person, of any human right or fundamental freedom' (section 9(1A))

This is held to be a form of racial discrimination.
 8. CCL submits the *Racial Discrimination Act* and the *Privacy Act*, as well as other relevant treaties, establishes the framework in which the proposed legislation must be assessed. These earlier international obligations are at least as important, as a matter of principle, constitutionally and internationally, as our obligations under the Financing of Terrorism treaty.
 9. Together, the *Privacy Act*, the *Racial Discrimination Act*, the HREOC Act and other legislation incorporating international treaties create a framework that recognises minimum international standards of human rights and civil rights and liberties. Most importantly they recognise a minimum entitlement to privacy, and to be free from racial discrimination.
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10. CCL recognises the importance for Australia to combat terrorism and the threat of terrorism, and supports properly adapted and proportionate measures towards this end. However it is more important to recognise that the government is required to formulate and implement these policies within the limits of all of the government's international law obligations. It would be anomalous for the Australian government to breach its binding treaty obligations, including its long-standing international human rights obligations, in order to follow non-binding recommendations of an international body.

Consultation

11. CCL welcomes this Senate enquiry. However CCL notes that the bill was written between March 2004 and December 2005. During these eighteen months, industry groups were consulted to ensure the proposed measures do not create an unreasonable compliance burden on businesses. However, it seems these consultations were limited to industry groups and legal advisors. Individuals in the community received neither information about the proposed laws, nor any opportunity to engage in similar consultations with the government.
 12. In contrast to the access given to industry groups, public interest and human rights bodies were only given the opportunity to comment on the proposed legislation after the draft legislation and rules have been written.
 13. The process, as a result, was unbalanced. The government recognised that the policy to combat terrorist financing must be balanced with businesses efficacy; but it seems to have failed to recognise that legislation to combat terrorist financing must uphold minimum international standards of human rights and civil liberties. Businesses that take on surveillance duties on behalf of the government were consulted to minimise the effect and burden of the proposed new regime; but individuals whose financial affairs and personal liberties will be exposed to government and private entities in such an unprecedented way were not informed, much less consulted.
 14. CCL is deeply concerned that this process means that in drafting this legislation the government has not been able to assess its likely impact on individuals, nor take into account interests and concerns other than those of business and industry. Industry and business concerns are undoubtedly crucial under the proposed public-private financial monitoring regime; however the interests of individuals who will be subject to this regime are even more crucial.
 15. Without questioning the policy decision to implement the FATF recommendations, CCL expresses strong disquiet at the consultation process that virtually sidelined humanitarian and international human rights interests, by focusing solely on one of many of Australia's pressing international law obligations.
 16. In the current global environment, there is already widespread concern that fundamental human rights are being eroded in the course of combating 'terrorism'. The Australian government presents itself as a nation that upholds democratic principles of government and civil society in contrast to terrorist regimes. It is important that in fighting terrorism the legislature is vigilant in protecting fundamental rights and does not itself undermine the very values
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and beliefs it is seeking to protect from external threats. This need to do so is even more pressing in Australia than in other western democracies as Australia lacks a bill of rights by which the courts can test the compatibility of legislation with fundamental rights.

Constitutional Basis and Misleading Title

17. We refer to our observations above on the range of Australia's international law obligations. Again, we emphasise that the assessment of the proposed legislation cannot be done in isolation, instead it must be assessed in light of the framework of international rights and civil liberties that Australia has recognised, some of which are incorporated into domestic law.
 18. While the title of the proposed legislation implements FATF recommendations, the details of the monitoring regime established by the legislation diverge from this stated purpose in many ways. Most importantly, there is no limit on the uses to which information collected under this legislation could be put. In effect, legislation and regulations supposedly designed to capture and combat serious international crime will routinely capture civil and petty criminal offences or breaches.
 19. Agencies such as Centrelink and the Child Support Agency already access AUSTRAC records to capture social security frauds. It is conceivable that other government and non-government 'partner agencies' could access such information. While AUSTRAC currently controls access through Memoranda of Understanding, and would continue to do so under the proposed legislation, CCL is concerned that the legislation imposes no limit on who may access sensitive financial and personal information, nor establish guidelines or criteria to determine who may be granted access.
 20. CCL is further concerned that any Memoranda of Understanding are confidential and not open to external scrutiny. Given the expansive nature of the surveillance regime contained in this legislation (and the proposed "second tranche") it is inappropriate that there are not clear and public limitations on the use of data collected by AUSTRAC. Any difficulties involved in drafting such restrictions are not an adequate justification for allowing unfettered access to this data.
 21. This feature of the legislation violates NPP8 and international protocols on collection and use of personal information. Under NPP 8, as under globally accepted standards, the uses for personal information must be stated at the time of collection, or as soon as practicable afterwards. Uses and disclosure of personal information is required to be tied to the purposes stated at the time of collection, or to uses and disclosures necessary for that purpose. These protocols are as significant as the FATF recommendations in setting global standards of regulation and conduct.
 22. CCL submits it is not permissible to deviate from these international standards by omitting control mechanisms in the legislation. Administrative discretion should only be exercised within recognised international standards.
 23. Such wide discretion and powers also make it questionable whether all parts of this proposed legislation would be supported by the External Affairs power in the Constitution.
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24. Instead of the current provisions that require reporting of 'suspicious transaction' that is potentially relevant to the investigation of 'an offence' against the undefined body of domestic civil, criminal, international, and overseas laws, including 'a taxation law', CCL recommends the legislation include the following requirement:

"a 'suspicious transaction' is a transaction that is

a) potentially relevant to the investigation of 'an offence' directly related to the financing of terrorism.

b) a transaction may also be suspicious if it is relevant to an 'offence' under an Australian law or a binding international treaty that has a reasonable connection to the financing of terrorism.

25. Similarly, allowing potentially unlimited access to any federal, state or overseas agency, 'for the purposes of performing the agency's functions', clearly takes the ambit of the legislation beyond its title and object clause. The proposed legislation in its current form allows any public or private agency to apply for access to information collection under this legislation, even if the agency's functions has no connection to money laundering or financing of terrorism. Even if it may be argued that social security fraud or income tax evasion could contribute to the financing of terrorism, by being part of the same national and global economic system, it is clear that there are other agencies, whose purpose is to promote international and national security, that would be able to make more effective and targeted use of such data than, for example, the Child Support Agency.

26. This failure to include limitations or accountability mechanism is also a clear violation of established data protection and privacy principles.

27. CCL recommends the legislation include the following,

'AUSTRAC may allow a designated agency to access data collected under this legislation if AUSTRAC is satisfied

a) the agency's purpose is reasonably related to preventing the financing of terrorism, and

b) the data will be used for purposes and investigations that are reasonably related to preventing the financing of terrorism.'

28. Alternately, CCL recommends the legislation includes an expanded objects clause,

'An Act to:

a) control the financing of terrorism under FATF recommendations;

b) allow the government to routinely record and monitor the financial affairs of all people through private businesses and corporations;

c) allow Australian and overseas agencies to access and use such information for any purposes, including purposes beyond the scope of Australia's international law obligations, and including uses that may violate Australia's other international law obligations.'

Invasion of Privacy

29. We refer to individuals' fundamental civil rights and liberties under ICCPR and national privacy law above. Seen against these basic rights, the legislation's identification requirements (Part 2), reporting requirements (Part 3), and monitoring requirements (Part 4) creates grave concerns.
 30. Under these provisions, service providers and their employees are required to report suspicious 'matters'. There is no corresponding requirement in the legislation that employees with such responsibilities are to be trained to a nationally certifiable standard. This creates huge potential for misreporting and over-reporting. Likewise businesses are likely to over-report to avoid penalties and even serious criminal sanctions (s.39(4) for failure to report) under the proposed legislation, particularly as the legislation provides no penalties for wrongful or negligent reporting or misuse of collected information.
 31. This imbalance in the reporting requirements and penalty regime creates three main concerns for individual civil liberties.
 32. Firstly this proposed regime overrides the anonymity privacy principle. Under the customer identification requirements, individuals will be forced to identify themselves to every service provider, for everyday transactions such as purchasing jewellery, seeking financial planning advice, and buying or selling a house. Under the 'know your customer' requirements, individuals will also be subject to continual monitoring of their financial activities and assessment by their service providers even for the most innocuous of transactions, such as a \$50 overseas transfer.
 33. These requirements violate the ICCPR privacy principle that interference with personal privacy is permissible under very limited circumstances. CCL notes that section 110 makes it a crime to provide a service on the basis of customer anonymity, which directly overrides the NPP 8. Such invasion is exacerbated under the proposed regime, because it will be private businesses that undertake the monitoring, recording, and reporting, effectively transforming the private sector into an extension of Australian security and intelligence agencies. This concern is address below.
 34. Secondly, the lack of quality control provisions in the legislation offends against the data quality principle. The information collected is highly likely to be of dubious quality, as each 'suspicious matter' will be the subjective judgment of people who are unlikely to know the relevant laws.
 35. The proposed regime also offends against individuals' access and correction rights under privacy laws, as the privacy-exempt suspicious transactions list thus created will be exempt from FOI law. It is uncertain how AUSTRAC will deal with information that appears to be unreliable, but it is submitted that the object of the legislation – prevention of terrorist financing – cannot be met if government or international investigations proceed on unreliable information. CCL notes that these secrecy provisions go beyond any existing regime in Australia, and even beyond the controversial wire-tapping laws in the United States. The CCL urges the government to reconsider the secrecy provisions, and to include a provision allowing ex post facto notice to be given to the affected individuals.
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36. In a recent consultation meeting with the Attorney General Department and AUSTRAC, the point was raised that existing requirements of customer notification is inadequate, as many individuals are unaware of the fact that their international fund transfers are already recorded. The degree of customer ignorance about the risks associated with their financial activities is likely to increase if all businesses acquire an obligation to monitor and report, but not a corresponding obligation to notify customers that they are being monitored and reported.
37. CCL suggests the legislation impose a clear customer notification requirement for transactions that are not exempt from the privacy laws; CCL also suggests a notification to customer that businesses and service providers are required to monitor and report their financial activities, at the beginning of the 'business relationship', and each time the customer undertakes an activity that is likely to be 'suspicious'.
38. In other words, the legislation should, at a minimum, provide a mechanism by which individuals may be warned against financial products or transactions that is likely to generate a 'suspicious transactions' report.
39. CCL also submits that the legislation ought to include provisions that allow individuals to access their AUSTRAC files. Instead of the blanket ban on access to the 'suspicious transactions' list, it is suggested that the onus of proof be placed on AUSTRAC or the Attorney-Generals Department. AUSTRAC or the Attorney General would be required to consider each request on its own merits, with a final right of refusal if the information is deemed to be sensitive information and in the interests of national security.
40. Alternately it is suggested that individuals have the right to require an impartial, third-party intermediary to access the individual's files and undertake audit of the 'suspicious matters' reports.
41. CCL is also concerned about the requirement to keep employee records, which are currently exempt from privacy legislation. It is suggested that employee records should become subject to privacy legislation.
42. To ensure that public interest in civil liberties are not eroded by the proposed regime, it is suggested the legislation include provisions that penalises businesses for
 - a) grossly negligent or wilfully false reporting customer and employee information;
 - b) failure to notify customers at the beginning of their business relationship of the degree of reporting required, and before each transaction that is likely to generate a suspicious transactions report against the customer;
43. Lastly it is suggested a 'good faith' defence be available to any penalties associated with failure to report.

Potential for Racial Discrimination

44. We refer to our observations on Australia's obligations under the Convention to Eliminate All Forms of Racial Discrimination, incorporated by the *Racial Discrimination Act 1975*.
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45. CCL notes, with great concern, the lack of precision in the definition of 'suspicious matters'. In conjunction with the decision to give private businesses and corporations the power to decide which matters and transactions are 'suspicious' and likely to have a connection to national security and international peace, and the lack of training or quality control mechanisms, this could become a state-sanction method of racial and other discrimination.
46. The criteria for 'suspicious matters' has been left to the regulations, and a draft criteria under the sample rules include such intangible and hard-to-define matters as manner and circumstances. CCL believes that assessment of suspicious matters made under these criteria is liable to be impression-based and highly subjective. Part 9 (Countermeasures) of the proposed legislation allow the government to prohibit financial transaction to and from residents of particular countries. The combined effect of these provisions could be to encourage unwarranted 'suspicion' against persons of particular ethnic backgrounds or appearances. If so, this may create discrimination against individuals from non English-speaking backgrounds, because their behaviour, language, and lack of familiarity with Australian institutions and laws could lead to false 'suspicious transactions' reports against them.
47. For this reason, CCL suggests that these above provisions be preceded by the statement that assessment and monitoring of 'suspicious matters' should be undertaken, subject to the *Racial Discrimination Act*. It is also suggested individuals be expressly entitled to bring complaints against reporting entities or agencies on the basis of racial discrimination, as well as privacy violation.

Lack of Accountability

48. This legislation raises concerns by drastically reducing the degree to which the government and government agencies will be accountable for Australia's national security and intelligence operations. It does so by 'privatising' the state's intelligence functions to private businesses and service providers.
 49. Individuals cannot control corporations and business actions to the degree that government actions may be held accountable under administrative and public law. The proposed legislation may mean that individuals will only have recourse to the Privacy Commissioner or Industry Ombudsman for any redress or information about data collection about them.
 50. Express exemptions from FOI and Privacy laws is also a concern. As highlighted above, the lack of penalty provision about misuse or disclosure is exacerbated by the fact that individuals will not be able to use the usual administrative avenues of appeal and redress. In the absence of public accountability, exemption from FOI laws creates another layer of protection for private reporting entities, in addition to any claims of commercial confidence that may prevent businesses from being held accountable for their reporting activities.
 51. The outsourcing to corporations also creates concern about who will have access to the stored records of customers and transactions. Individuals in these data will be easily identifiable by their unique customer number. Even if businesses are controlled by existing security requirements, the sheer amount
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of data that will need to be collected and stored creates the very real prospect that business data may be stolen or misapplied.

52. While some of the above matters may be dealt with in the regulations, CCL believes it is crucial to ensure that existing privacy protection will not be sidelined or eroded under the proposed legislation. As such we suggest a provision specifying that if a small business or service provider acquires monitoring and reporting obligations under the proposed legislation, they will also acquire security and privacy obligations under the *Privacy Act*.
53. For this reason, CCL suggests the addition of a penalty provision, that penalises deliberate supply or use of data for commercial purposes.
54. CCL also submits that regulations and guidelines about what constitutes 'suspicious matters' ought not be left to the regulations. These are fundamental to any assessment of the legislation's proportionality and validity. Reflecting our earlier submission that statements of principle or guidelines protecting fundamental civil liberties should be part of the legislation, to minimise the lack of accountability for the actions of private entities.
55. Lastly, to address the basic concern that this legislation 'privatises' administrative functions from the government to the private, commercial sector, CCL suggests provisions in the legislation that
 - a) makes AUSTRAC and the Attorney General responsible for ensuring a national level of education and training for businesses and service providers that will have monitoring and reporting responsibilities;
 - b) clarifies the relationship and responsibilities between agencies that access and use information, AUSTRAC, and private entities that collect the information. This is critical to ensure that if information is wrongly or negligently reported and used against individuals, there is no uncertainty about who is liable for such misuse and subsequent abuse of individual privacy.

Natural Justice

56. It is uncertain whether the suspicious transactions reports, expressly exempt from FOI and privacy legislation, will also allow the government to give evidence in investigations or trials 'in camera'. In particular, CCL notes that sections 93-95 and 105 of the proposed legislation may constrain AUSTRAC from cooperating with any investigations or trials brought by individuals. If so, this legislation may prevent the Courts from carrying out their constitutional function.
 57. In conjunction with provisions in Part 13 (Audit) that allows judges to issue audit warrants, in their personal capacity, this creates the concern that the constitutional principle of the separation of the judiciary will be eroded.
 58. In view of these concerns, CCL considers it is important to include provisions that enshrine the fundamental constitutional principle of the independence of the judiciary, the requirement that the government and designated agencies cooperate in any investigation and trial of matters within the Courts'
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jurisdiction, and a statement that the legislation does not intend to undermine the common law principle of natural justice.

Impact on other laws

59. As noted above, this legislation creates a privacy-exempt suspicious transactions list. This will have much wider and serious ramifications for individuals than can be seen from this proposed legislation alone.
60. For example, individuals are required to undergo security clearances for a large number of government and non-government employment. If the privacy-exempt suspicious transactions list is accessible to government agencies and designated private or international agencies, individuals could be penalised for false information wrongly reported against them.
61. Under proposed Australian Citizenship laws, the Minister for Immigration and Indigenous and Multicultural Affairs would have the discretion to refuse Australian citizenship to anyone who does not prove their identity. If the Minister has discretion to refuse Australian citizenship, it is conceivable that a mistaken or false report about an individual on the AUSTRAC privacy-exempt suspicious transactions list would influence the Minister's exercise of his or her discretion.
62. The list could also affect other migration matters, potentially raising racial discrimination concerns.

Conclusion

63. Unfortunately due to the large number of submissions and consultations we are unable to provide a more comprehensive submission at this time. We have had the benefit of reading a draft copy of the submissions of the Australian Privacy Foundation, and we support those submissions.
64. CCL would also be happy to elaborate on any of the above points and to give evidence at public hearings.
65. If the proposed legislation violates these international standards, it ironically undermines the aim of Anti-Terrorism treaties and laws – to maintain and protect a democratic way of life and to uphold fundamental rights and liberties.

Yours faithfully,

Rhonda Luo
Member

Anish Bhasin
Committee Member
